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Department of Defense DIRECTIVE

AD-A275 131



December 21, 1993
NUMBER 1332.30

ASD(P&R)

SUBJECT: Separation of Regular Commissioned Officers

- References:
- (a) DoD Directive 1332.30, "Separation of Regular Commissioned Officers for Cause," February 12, 1986 (hereby canceled)
 - (b) Chapter 60 and Sections 618, 630, 654, 827, and 831 of title 10, United States Code
 - (c) DoD Directive 1010.4, "Alcohol and Drug Abuse by DoD Personnel," August 25, 1980
 - (d) DoD 5200.2-R, "DoD Personnel Security Program," January 1987, authorized by DoD Directive 5200.2, May 6, 1992
 - (e) Sections 801-940 of title 10, United States Code, "Uniform Code of Military Justice"

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A. REISSUANCE AND PURPOSE

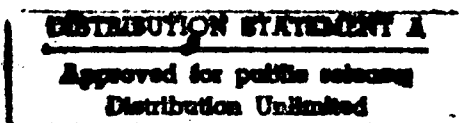
This Directive:

1. Reissues reference (a)
2. Implements Chapter 60 and Section 630 of reference (b) to update policy, responsibilities, and procedures governing the administrative separation of commissioned officers for substandard performance of duty, for an act or acts of misconduct or moral or professional dereliction, or in the interest of national security.
3. Implements Chapter 60 and Section 630 of reference (b) on the discharge of regular commissioned officers with less than 5 years active commissioned service in certain circumstances.

B. APPLICABILITY AND SCOPE

This Directive:

1. Applies to the Office of the Secretary of Defense (OSD) and to the Military Departments. The term "Military Services," as used herein, refers to the Army, the Navy, the Air Force, and the Marine Corps.
2. Applies to regular commissioned officers of the Military Services.
3. Does not apply to commissioned warrant officers and retired commissioned officers of the Military Services.



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C. DEFINITIONS

Terms used in this Directive are defined in enclosure 1.

D. POLICY

1. It is DoD policy to:

a. Promote the readiness of the Military Services by maintaining high standards of conduct and performance. An individual is permitted to serve as a commissioned officer in the Military Services because of the special trust and confidence the President and the nation have placed in his or her patriotism, valor, fidelity, and competence. Commissioned officers are expected to display responsibility commensurate to this special trust and confidence and to act with the highest integrity at all times.

b. Judge the suitability of persons to serve in the Armed Forces on the basis of their conduct.

c. Separate from Military Service those commissioned officers who will not or cannot exercise the responsibility, fidelity, integrity, or competence required of them to:

(1) Ensure that the Military Services meet rigorous and necessary standards of duty, performance, and discipline.

(2) Maintain those high standards of performance and conduct through appropriate actions that sustain the traditional concept of honorable Military Service.

2. Notwithstanding any other provision of this Directive, the Secretaries of the Military Departments concerned may discharge regular commissioned officers with less than 5 years active commissioned service from a Military Service when there is a need to reduce the number of officers in that Service to meet budgetary or force size requirements. Enclosure 6 applies to the discharge of probationary officers under this authority.

3. The Assistant Secretary of Defense for Personnel and Readiness (ASD(P&R)), in coordination with the Secretaries of the Military Departments, shall ensure that officers separated under this Directive are fully informed of assistance available from the Department of Defense to assist them in the transition to civilian life.

E. RESPONSIBILITIES

1. The Assistant Secretary of Defense for Personnel and Readiness shall supplement this Directive, as needed.

2. The Secretaries of the Military Departments shall:

a. Prescribe regulations consistent with the policy and procedures contained in this Directive.

b. Address any recommendations for policy changes in this Directive to the ASD(P&R).

F. PROCEDURES

Procedures and standards for implementation of the policy in section D., above, are in enclosures 2 through 8.

G. EFFECTIVE DATE AND IMPLEMENTATION

1. This Directive is effective February 5, 1994.

2. This Directive applies only to administrative separation proceedings initiated on or after February 5, 1994, unless the Secretary of the Service concerned determines that it should be applied in a particular case in which proceedings were initiated before that date.

3. Forward two copies of proposed implementing documents to the Assistant Secretary of Defense for Personnel and Readiness within 30 days of the signature date.



Enclosures - 8

1. Definitions
2. Reasons for Separation
3. Procedures for Nonprobationary Commissioned Officers
4. Composition of Boards
5. Board of Inquiry Procedures
6. Procedures for Certain Probationary Commissioned Officers
7. Character of Discharge
8. Guidelines for Fact-Finding Inquires into Homosexual Conduct

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DEFINITIONS

1. Active Commissioned Service. Service on active duty as a commissioned officer in a grade above warrant officer, W-4.
2. Bisexual. A person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts.
3. Commissioned Officer. An officer in any of the Military Services who holds a grade and office under a commission signed by the President, other than a commissioned warrant officer or retired commissioned officer.
4. Convening Authority. The Secretary of the Military Department concerned who may delegate this responsibility as appropriate.
5. Counsel. A lawyer qualified under 10 U.S.C. 827 (b)(1) (reference (b)) or a civilian lawyer retained at the commissioned officer's expense.
6. Drug Abuse. As defined in DoD Directive 1010.4 (reference (c)).
7. Homosexual. A person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.
8. Homosexual Act
 - a. Any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires, and
 - b. Any bodily contact that a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in paragraph 8.a., above.
9. Homosexual Conduct. A homosexual act, a statement by the Service member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage.
10. Legal Advisor. A judge advocate qualified under 10 U.S.C. 827 (b)(1) (reference (b)) and appointed to assist a Board of Inquiry.
11. Nonprobationary Commissioned Officer. A commissioned officer other than a probationary commissioned officer.
12. Probationary Commissioned Officer. A Commissioned officer with less than 5 years of active commissioned service; however, a regular commissioned officer serving on active duty on September 14, 1981, shall be a probationary commissioned officer for a period of 3 years from the date of his or her appointment as a regular commissioned officer.
13. Propensity. Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts.
14. Respondent. A commissioned officer required to show cause for retention on active duty.
15. Separation. Discharge, retirement, or resignation.

16. Sexual Orientation. A sexual attraction to individuals of a particular sex.

17. Show-Cause Authority. Any of the following as determined by the Secretary of the Military Department concerned:

a. Commanders exercising General Court Martial authority and all general or flag rank officers in command who have a judge advocate or legal advisor available.

b. The Secretary of the Military Department concerned or officers (not below the grade of major general or rear admiral) designated by the Secretaries of the Military Departments to determine, based on a record review, that an officer shall be required to show cause for retention on active duty.

REASONS FOR SEPARATION

A. SUBSTANDARD PERFORMANCE OF DUTY

A commissioned officer may be separated from a Military Service, under regulations prescribed by the Secretary of the Military Department concerned, when, as compared to other commissioned officers of his or her grade and experience, he or she is found to be substandard in any of the following respects:

1. Performance of duty.
2. Efficiency.
3. Leadership.
4. Lack of response to training, in that performance of duties in the officer's assigned speciality is precluded or impaired to the degree of being unsatisfactory.
5. Attitude or character.

B. ACTS OF MISCONDUCT OR MORAL OR PROFESSIONAL DERELICTION

A commissioned officer may be separated from the Military Service, under regulations prescribed by the Secretary of the Military Department concerned, when he or she is found to have committed an act or acts of misconduct or moral or professional dereliction, which include (but are not limited to):

1. Serious or recurring wrongdoing, punishable by military or civilian authorities.
2. Intentional or discreditable mismanagement of personal affairs, including financial affairs.
3. Drug abuse.
4. Intentional neglect of, or failure to perform, assigned duties or complete required training.
5. Conduct resulting in the loss of professional status to such an extent as to impair performance of assigned military duties.
6. Intentional misrepresentation of facts in obtaining an appointment or in official statements or records.

C. HOMOSEXUAL CONDUCT

Homosexual conduct is grounds for separation from the Military Services. Homosexual conduct includes homosexual acts, a statement by a member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. A statement by a member that demonstrates a propensity or intent to engage in homosexual acts is grounds for separation not because it reflects the member's sexual orientation, but because the statement indicates a likelihood that the member engages in or will engage in homosexual acts. Sexual orientation is considered a personal and private matter, and homosexual orientation is not a bar to continued service unless manifested by homosexual conduct.

1. A commissioned officer shall be separated under this provision if one or more of the following approved findings is made:

a. The officer has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts, unless there are approved further findings that the officer has demonstrated that:

(1) Such acts are a departure from the officer's usual and customary behavior;

(2) Such acts under all the circumstances are unlikely to recur;

(3) Such acts were not accomplished by use of force, coercion, or intimidation;

(4) Under the particular circumstances of the case, the officer's continued presence in the Armed Forces is consistent with the interests of the Armed Forces in proper discipline, good order, and morale of the Service; and,

(5) The officer does not have a propensity or intent to engage in homosexual acts.

b. The officer has made a statement that he or she is a homosexual or bisexual, or words to that effect, unless there is a further approved finding that the officer has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. A statement by an officer that he or she is a homosexual or bisexual, or words to that effect, creates a rebuttable presumption that the officer engages in homosexual acts or has a propensity or intent to do so. The officer shall be advised of this presumption and given the opportunity to rebut the presumption by presenting evidence that he or she does not engage in homosexual acts and does not have a propensity or intent to do so. Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts. In determining whether an officer has successfully rebutted the presumption that he or she engages in or has a propensity or intent to engage in homosexual acts, some or all of the following may be considered:

(1) Whether the officer has engaged in homosexual acts;

(2) The officer's credibility;

(3) Testimony from others about the officer's past conduct, character, and credibility;

(4) The nature and circumstances of the officer's statement;

(5) Any other evidence relevant to whether the officer is likely to engage in homosexual acts.

(This list is not exhaustive; any other relevant evidence may also be considered.)

c. The officer has married or attempted to marry a person known to be of the same sex (as evidenced by the external anatomy of the persons involved).

2. The commissioned officer shall bear the burden of proving, by a preponderance of the evidence, that retention is warranted under the limited circumstances described in paragraphs C.1.a. and C.1.b. of this enclosure, above, except in cases where the officer's conduct was solely the result of a desire to avoid or terminate military service.

3. Nothing in this Directive or the Service implementing regulations requires that an officer be processed for separation when a determination is made in accordance with regulations prescribed by the Secretary concerned that:

a. The officer engaged in acts, made statements, or married or attempted to marry a person known to be of the same biological sex for the purpose of avoiding military service; and

b. Separation of the officer would not be in the best interest of the Armed Forces.

D. RETENTION IS NOT CONSISTENT WITH THE INTERESTS OF NATIONAL SECURITY

Under DoD 5200.2-R (reference (d)), a commissioned officer may be separated from a Military Service when it is determined that the commissioned officer's retention is clearly inconsistent with the interest of national security.

E. MULTIPLE REASONS

A commissioned officer may be considered for separation under all the reasons in sections A., B., C., and D. of this enclosure above; however, separate findings under each applicable section shall be required as to the reasons for separation.

PROCEDURES FOR NONPROBATIONARY COMMISSIONED OFFICERS

A. INITIATION OF ACTION

The Secretary of each Military Department shall prescribe procedures for the initiation of separation recommendations.

B. SHOW-CAUSE AUTHORITY

1. The show-cause authority will determine whether an officer shall be required to show cause for retention on active duty for one or more of the reasons listed in enclosure 2, and as further defined by the Secretary of the Military Department concerned.

2. The show-cause authority shall:

a. Evaluate all information presented concerning the case under consideration.

b. Determine whether the record is sufficient to require the officer to show cause for retention on active duty.

c. Under regulations prescribed by the Secretary concerned, close the case if the authority determines that the officer should not be required to show cause for retention on active duty.

d. Report the matter for referral to a Board of Inquiry if the authority determines that the officer should be required to show cause for retention on active duty. The reasons for making such a determination shall be provided to the officer in writing.

e. Refer the case to a Board of Inquiry if the record supports a finding of homosexual conduct under enclosure 2.

f. Consider the initiation of separation action if the record supports a finding of drug abuse under enclosure 2.

3. As provided in 10 U.S.C. 618(b)(2) (reference (b)), the Secretary concerned may require an officer to show cause for retention on active duty based upon the recommendation of a promotion selection board.

C. BOARD OF INQUIRY

1. Composition. See enclosure 4.

2. Convening. A Board of Inquiry shall be convened under such regulations as may be prescribed by the Secretary of the Military Department concerned.

3. Function. A Board of Inquiry shall give a fair and impartial hearing to a respondent. The Board of Inquiry is an administrative board that shall consider all relevant and material evidence pertaining to the case and shall

function under rules and procedures established by the Secretary of the Military Department concerned. The Board of Inquiry shall make findings of fact and a recommendation as to whether a respondent should be retained on active duty. The board also shall recommend the character of discharge in accordance with regulations prescribed by the Secretary of the Military Department concerned, if it recommends discharge. Its findings must be supported by a preponderance of the evidence. The proceedings and hearing before a Board of Inquiry are intended to give the officer an opportunity to respond to, and rebut, the basis for the contemplated change of status, after having been informed of the contemplated change and the reasons therefor. The hearing shall provide a forum for why the officer concerned thinks the contemplated action should not be taken.

4. Determinations

a. If a Board of Inquiry determines that the respondent's retention on active duty is warranted, the case is closed. In the case of homosexual conduct, the board shall make specific findings of the reasons warranting retention in accordance with enclosure 2.

b. If a Board of Inquiry determines that the respondent's retention on active duty is not warranted, it shall report the matter to a Board of Review, making specific findings of the reasons retention is not warranted and, if appropriate, stating the character of discharge to be issued to the respondent.

D. BOARD OF REVIEW

1. Composition. See enclosure 4.

2. Convening. A Board of Review shall be convened under such regulations prescribed by the Secretary of the Military Department concerned.

3. Function. After a Board of Inquiry has determined a respondent has failed to establish that retention on active duty is warranted, the Board of Review shall review the record for the purpose of examining the grounds for such determination.

4. Determinations

a. If a Board of Review determines that the respondent has established that retention on active duty is warranted, the case is closed. In the case of homosexual conduct, the board shall make specific findings of the reasons warranting retention in accordance with enclosure 2.

b. If a Board of Review determines that the respondent has failed to establish that retention on active duty is warranted, the Board of Review shall recommend to the Secretary of the Military Department concerned that the respondent should be separated, making specific findings of the reasons retention is not warranted and, if appropriate, stating the character of discharge to be issued to the respondent.

E. ACTION BY THE SECRETARY OF THE MILITARY DEPARTMENT CONCERNED UPON
RECOMMENDATION OF THE BOARD OF REVIEW

If the Board of Review recommends that the respondent not be retained on active duty, the Secretary of the Military Department concerned may direct:

1. Separation.
2. Retention.

The action of the Secretary is final.

F. RETIREMENT OR DISCHARGE

1. Retirement. A commissioned officer separated from active duty in accordance with this Directive, if eligible for voluntary retirement under any provisions of law on the date of such separation, shall be retired in the grade and with the retired pay for which eligible if retired under such provision.

2. Discharge. A commissioned officer separated from active duty in accordance with this Directive, if ineligible for retirement under any provision of law on the date of such separation, shall be:

a. Honorably discharged in the grade then held if separated only for substandard performance of duty; or

b. Discharged in the grade then held if separated for misconduct, for moral or professional dereliction, homosexual conduct, or in the interest of national security. The character of discharge shall be determined by the Secretary of the Military Department concerned but in no case shall it be more severe than that recommended by the Board of Inquiry.

G. APPLICATION FOR RETIREMENT OR DISCHARGE

At any time before final action in the case, the Secretary of the Military Department concerned may grant a request by the commissioned officer concerned for:

1. Voluntary retirement.
2. Discharge.

The action of the Secretary is final.

H. LIMITATIONS

1. A commissioned officer required to show cause for retention on active duty because of substandard performance of duty and who is retained on active duty by a Board of Inquiry or a Board of Review may not again be required to show cause for retention for the same reasons within the one-year period beginning on the date of the determination to retain.

2. Subject to paragraph H.3., below, a commissioned officer required to show cause for retention on active duty because of misconduct, moral or professional dereliction, homosexual conduct, or in the interest of national security, and who is retained on active duty by a Board of Inquiry or a Board of Review may again be required to show cause for retention at any time.

3. A commissioned officer may not again be required to show cause for retention on active duty solely because of conduct that was the subject of the previous proceedings, unless the findings and recommendations of the

Board of Inquiry or Board of Review that considered the case are determined to have been the result of fraud or collusion.

COMPOSITION OF BOARDS

A. COMPOSITION

Each board convened in accordance with this Directive shall be composed of at least three commissioned officers having the qualifications prescribed by section B. of this enclosure. The senior member shall be the President of the Board. A nonvoting legal advisor may also be appointed to assist the Board of Inquiry.

B. OFFICERS ELIGIBLE TO SERVE ON BOARDS

1. Each commissioned officer who serves on a board must be an officer on the active duty list of the same Military Service as the respondent.

2. A commissioned officer may not serve on a board unless he or she is serving on active duty in a grade above lieutenant colonel or commander, and is senior in grade and rank to any respondent being considered by the board.

3. If qualified commissioned officers from the active duty list are not available in sufficient numbers to comprise a board, the Secretary of the Military Department concerned shall complete the membership of the board by appointing retired regular commissioned officers of the same Military Service. The retired grade of such officers must be above lieutenant colonel or commander and must be senior to the grade held by any respondent being considered by the board.

4. No person shall be a member of more than one board convened under this Directive to consider the same respondent.

BOARD OF INQUIRY PROCEDURES

A. CHALLENGES

Under regulations prescribed by the Secretary of the Military Department concerned, board members are subject to challenge for cause only. In the event the membership of the board is reduced to less than three officers, the convening authority shall appoint additional members.

B. LEGAL ADVISOR

The legal advisor, if appointed, shall perform such functions as the Secretary of the Military Department concerned may prescribe except that the legal advisor has no authority to dismiss any allegation against the respondent or to terminate the proceedings.

C. RECORDER

The Government may be represented before the board by a recorder whose duties shall be prescribed by the Secretary of the Military Department concerned.

D. RIGHTS OF A RESPONDENT REQUIRED TO SHOW CAUSE FOR RETENTION BEFORE A BOARD OF INQUIRY

1. When the case is referred to a Board of Inquiry, the respondent shall be notified in writing, at least 30 days before the hearing, of the reasons for which he or she shall be required to show cause for retention on active duty and of the least favorable characterization of discharge for which the officer may be recommended.

2. The respondent shall be allowed a reasonable period of time, as determined by the Board of Inquiry, to prepare his or her showing of cause for retention on active duty.

3. The respondent may appear in person at all proceedings of the Board of Inquiry.

4. The respondent may be represented either by military counsel appointed by the convening authority or by military counsel of the respondent's own choice (if the counsel of choice is determined to be reasonably available under regulations prescribed by the Secretary of the Military Department concerned), but not by both. The respondent may employ civilian counsel, at no expense to the Government, in which case no military counsel shall be assigned, if so provided by regulations of the Secretary of the Military Department concerned.

5. The respondent shall be allowed full access to, and be furnished copies of, records relevant to the case; however, the Board of Inquiry shall be assigned, if so provided by regulations of the Secretary of the Military Department concerned.

5. The respondent shall be allowed full access to, and be furnished copies of, records relevant to the case; however, the Board of Inquiry shall withhold any records that the Secretary of the Military Department concerned determines should be withheld in the interest of national security. When any records are withheld, the respondent shall be furnished, to the extent practicable, a summary of the records so withheld.

6. The respondent may request the appearance before the board of any witness whose testimony is considered to be pertinent to his or her case. A determination on the availability of the witness or whether the witness shall

PROCEDURES FOR PROBATIONARY COMMISSIONED OFFICERS

A. INITIATION OF ACTION

The SCA may initiate action for any of the reasons stated in enclosure 2 of this Directive, or for such other reasons as the Secretary of the Military Department concerned may prescribe by regulation. Prior to forwarding the record to the Secretary of the Military Department concerned, the commissioned officer shall be advised in writing of the following:

1. The reason action was initiated and the character of discharge recommended.
2. That he or she may tender a resignation.
3. That he or she may submit a rebuttal or declination statement instead of a resignation.
4. That he or she may confer with appointed or retained counsel.

The officer shall be permitted a reasonable period of time to prepare his or her response.

B. PROCESSING

1. If submitted, the resignation, with the record, shall be forwarded to the authority designated to take final action.

2. If the officer does not tender a voluntary resignation, or if voluntary resignation is not accepted by the Departmental Secretary, the case shall be returned to the SCA for action. If, under regulations of the Secretary concerned, the SCA determines the officer shall be separated with a general discharge, the SCA may refer the case to a Board of Officers or a Board of Inquiry, as determined appropriate, or submit the case to the Secretary concerned who will take a final action. If the SCA determines the officer should be separated with an Other Than Honorable Discharge, the SCA shall refer the case directly to a Board of Inquiry in accordance with Sections C, D, and E of enclosure 3.

3. If the commissioned officer does not tender a resignation statement, and an "Honorable" discharge is recommended by a Board of Inquiry, the record and any rebuttal shall be submitted to the Secretary of the Military Department concerned for final decision.

4. The Secretary of the Military Department concerned may direct referral of the record to a Board of Inquiry whenever the Secretary considers such action appropriate, and the case shall be processed in accordance with sections C., D., and E. of enclosure 3.

C. FINAL DETERMINATION

The Secretary of the Military Department concerned may direct:

1. Retention.
2. Discharge.

The action of the Secretary is final.

CHARACTER OF DISCHARGE

A. DISCHARGE FOR SUBSTANDARD PERFORMANCE OF DUTY

A discharge shall be characterized as "honorable" when substandard performance of duty is the sole basis for the discharge.

B. DISCHARGE FOR MISCONDUCT, OR FOR MORAL OR PROFESSIONAL DERELICTION, OR HOMOSEXUAL CONDUCT, OR IN THE INTERESTS OF NATIONAL SECURITY

A discharge shall be characterized as "Honorable," "General (Under Honorable Conditions)", or "Under Other Than Honorable Conditions."

1. Consideration. The character of a discharge shall be predicated on the commissioned officer's behavior and performance of duty while a member of a Military Service. Characterization normally shall be based on a pattern of behavior and duty performance rather than an isolated incident. There are circumstances, however, in which conduct reflected by a single incident may provide the basis for characterization.

2. Exceptions

a. A discharge shall be characterized as "Honorable" when the grounds for discharge are based solely on pre-Service activities, other than intentional misrepresentation, or omission of facts, in obtaining an appointment or in official statements or records.

b. A discharge shall be characterized as "Honorable" or "Under Honorable Conditions" when the sole basis for separation is homosexual conduct unless aggravated acts are included in the findings. A separation "Under Other Than Honorable Conditions" may be issued if there is a finding that the officer attempted, solicited, or committed a homosexual act:

- (1) By using force, coercion, or intimidation.
- (2) With a person under 16 years of age.
- (3) With a subordinate in circumstances that violate the customary military superior-subordinate relationship.
- (4) Openly in public view.
- (5) For compensation.
- (6) Aboard a military vessel or aircraft.
- (7) In another location subject to military control under aggravating circumstances, noted in the finding, that have an adverse impact on discipline, good order, or morale comparable to the impact of such activity aboard a vessel or aircraft.

GUIDELINES FOR FACT-FINDING INQUIRIES INTO HOMOSEXUAL CONDUCT

A. RESPONSIBILITY

1. Only the member's commander is authorized to initiate fact-finding inquiries involving homosexual conduct. A commander may initiate a fact-finding inquiry only when he or she has received credible information that there is basis for discharge. Commanders are responsible for ensuring that inquiries are conducted properly and that no abuse of authority occurs.

2. A fact-finding inquiry may be conducted by the commander personally or by a person he or she appoints. It may consist of an examination of the information reported or a more extensive investigation, as necessary.

3. The inquiry should gather all credible information that directly relates to the grounds for possible separation. Inquiries shall be limited to the factual circumstances directly relevant to the specific allegations.

4. If a commander has credible evidence of possible criminal conduct, he or she shall follow the procedures outlined in the Manual for Courts-Martial and implementing regulations issued by the Secretaries of the Military Departments concerned.

B. DEFINITIONS

1. Bisexual. A person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts.

2. Commander. A commissioned or warrant officer who, by virtue of rank and assignment, exercises primary command authority over a military organization or prescribed territorial area that under pertinent official directives is recognized as a "command."

3. Credible Information. Credible information exists when the information, considering its source and the surrounding circumstances, supports a reasonable belief that a Service member has engaged in homosexual conduct. It requires a determination based on articulable facts, not just a belief or suspicion.

4. Homosexual. A person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

5. Homosexual Conduct. "Homosexual conduct" is a homosexual act, a statement by the member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage.

a. A "homosexual act" means any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires and any bodily contact (for example, hand-holding or kissing, in most circumstances) that a reasonable person would understand to demonstrate a propensity or intent to engage in such an act.

b. A "statement that a member is a homosexual or bisexual, or words to that effect," means (1) language or behavior that (2) a reasonable person would believe (3) intends to convey the statement (4) that a person engages in or has a propensity or intent to engage in homosexual acts. This includes statements such as "I am a homosexual," "I am gay," "I am a lesbian," "I have a homosexual orientation," and the like.

c. A "homosexual marriage or attempted marriage" is when a member has married or attempted to marry a person known to be of the same biological sex.

d. "Propensity to engage in homosexual acts" means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts.

6. Sexual Orientation. A sexual attraction to individuals of a particular sex.

C. BASIS FOR CONDUCTING INQUIRIES

A commander will initiate an inquiry only if he or she has credible information that a basis for discharge exists. A basis for discharge exists if:

1. The member has engaged in a homosexual act.
2. The member has said that he or she is a homosexual or bisexual, or made some other statement that indicates a propensity or intent to engage in homosexual acts; or
3. The member has married or attempted to marry a person of the same sex.

D. PROCEDURES

1. Informal fact-finding inquiries and administrative separation procedures are the preferred method of addressing homosexual conduct. This does not prevent disciplinary action or trial by courts-martial when appropriate.

2. Commanders shall exercise sound discretion regarding when credible information exists. They shall examine the information and decide whether an inquiry is warranted or whether no action should be taken.

3. Commanders or appointed inquiry officials shall not ask, and members shall not be required to reveal, their sexual orientation. However, upon receipt of credible information of homosexual conduct, commanders or appointed inquiry officials may ask members if they engaged in homosexual conduct. But the member should first be advised of the DoD policy on homosexual conduct. Should the member choose not to discuss the matter further, the commander should consider other available information.

4. At any given point of the inquiry, the commander or appointed inquiry official must be able clearly and specifically to explain which grounds for separation he or she is attempting to verify and how the information being collected relates to those specific separation grounds.

5. A statement by a Service member that he or she is a homosexual or bisexual creates a rebuttable presumption that the Service member engages in homosexual acts or has a propensity or intent to do so. The Service member shall be given the opportunity to present evidence that he or she does not engage in homosexual acts and does not have a propensity or intent to do so.

6. The Service member bears the burden of proving, by a preponderance of the evidence, that he or she is not a person who engages in, has a propensity to engage in, or intends to engage in homosexual acts.

E. CREDIBLE INFORMATION DOES NOT EXIST, FOR EXAMPLE, WHEN:

1. The individual is suspected of engaging in homosexual conduct, but there is no credible information, as defined, to support that suspicion; or

2. The only information is the opinions of others that a member is homosexual; or

3. The inquiry would be based on rumor, suspicion, or capricious claims concerning a member's sexual orientation; or

4. The only information known is an associational activity such as going to a gay bar, possessing or reading homosexual publications, associating with known homosexuals, or marching in a gay rights rally in civilian clothes. Such activity, in and of itself, does not provide evidence of homosexual conduct.

F. CREDIBLE INFORMATION EXISTS, FOR EXAMPLE, WHEN:

1. A reliable person states that he or she observed or heard a Service member engaging in homosexual acts, or saying that he or she is a homosexual or bisexual or is married to a member of the same sex; or

2. A reliable person states that he or she heard, observed, or discovered a member make a spoken or written statement that a reasonable person would believe was intended to convey the fact that he or she engages in or has a propensity or intent to engage in homosexual acts; or

3. A reliable person states that he or she observed behavior that amounts to a non-verbal statement by a member that he or she is a homosexual or bisexual; i.e., behavior that a reasonable person would believe intended to convey the statement that the member engages in or has a propensity or intent to engage in homosexual acts.

G. LEGAL EFFECT

The procedures in this enclosure create no substantive or procedural rights.

SUPPLEMENTARY

INFORMATION

AD-A275-130

ATTACHMENTS

16 Pages

DTIC
ELECTE
APR 13 1994

The following page changes to DoD Directive 1332.14, "Enlisted Administrative Separations," December 21, 1993, are authorized:

Remove: Pages 1 through 2-2 and 1-3&1-4, 1-9 through 1-12, 4-1 through 4-3 of attachment 1 to enclosure 3

Changes appear on pages 1 through 3, 1-1, and 2-2 and 1-3, 1-9&1-10, 1-12, 4-1 through 4-3 of attachment 1 to enclosure 3 and are indicated by margin asterisks.

Page 4., Subsections G.1. and .2. Change "February 5, 1994" to "February 28, 1994"

The above changes are effective February 28, 1994. Forward one copy of revised implementing documents to the Assistant Secretary of Defense for Personnel and Readiness within 120 days.

WHEN PRESCRIBED ACTION HAS BEEN TAKEN, THIS TRANSMITTAL SHOULD BE FILED WITH THE BASIC DOCUMENT



Department of Defense DIRECTIVE

December 21, 1993#

NUMBER 1332.14

SUBJECT: Enlisted Administrative Separations

- References:
- (a) DoD Directive 1332.14, subject as above, January 28, 1982 (hereby canceled)
 - (b) Section 977 of title 10, United States Code (Denial of Certain Benefits to Persons Who Fail to Complete at Least Two Years of an Original Enlistment)
 - (c) Pub. L. No. 97-66, "The Veterans' Disability Compensation, Housing, and Memorial Benefits Amendments Act of 1981", October 17, 1981, (95 Stat. 1035)
 - (d) Sections 801-940 of title 10, United States Code (Uniform Code of Military Justice, Articles 1-140)
 - (e) through (z), see enclosure 1

A. REISSUANCE AND PURPOSE

This Directive reissues reference (a) and updates policy, responsibilities, and procedures governing the administrative separation of enlisted members from the Military Services.

B. APPLICABILITY

This Directive applies to the Office of the Secretary of Defense and the Military Departments (including their Reserve components). The term "Military Services," as used herein, refers to the Army, the Navy, the Air Force and the Marine Corps.

C. DEFINITIONS

Terms used in this Directive are defined in enclosure 2.

D. POLICY

1. It is DoD policy to promote the readiness of the Military Services by maintaining high standards of conduct and performance. Separation policy promotes the readiness of the Military Services by providing an orderly means to:

- a. Judge the suitability of persons to serve in the Armed Forces on the basis of their conduct and their ability to meet required standards of duty performance and discipline;
- b. Maintain standards of performance and conduct through characterization of service in a system that emphasizes the importance of honorable service;

- * c. Achieve authorized force levels and grade distributions; and *
- * d. Provide for the orderly administrative separation of enlisted personnel in a variety of circumstances. *

2. DoD separation policy is designed to strengthen the concept that military service is a calling different from any civilian occupation.

a. The acquisition of military status, whether through enlistment or induction, involves a commitment to the United States, the Service, and one's fellow citizens and Service members to complete successfully a period of obligated service. Early separation for failure to meet required standards of performance or discipline represents a failure to fulfill that commitment.

b. Millions of Americans from diverse backgrounds and with a wide variety of aptitudes and attitudes upon entering military service have served successfully in the Armed Forces. It is DoD policy to provide Service members with the training, motivation, and professional leadership that inspires the dedicated enlisted member to emulate his or her predecessors and peers in meeting required standards of performance and discipline.

c. The Military Services make a substantial investment in training, time, equipment, and related expenses when persons are enlisted or inducted into military service. Separation prior to completion of an obligated period of service is wasteful because it results in loss of this investment and generates a requirement for increased accessions. Consequently, attrition is an issue of significant concern at all levels of responsibility within the Armed Forces. Reasonable efforts should be made to identify enlisted members who exhibit a likelihood for early separation, and to improve their chances for retention through counseling, retraining, and rehabilitation before initiation of separation proceedings. Enlisted members who do not demonstrate potential for further military service should be separated to avoid the high costs in terms of pay, administrative efforts, degradation of morale, and substandard mission performance that are associated with retention of enlisted members who do not conform to required standards of discipline and performance despite efforts at counseling, retraining, or rehabilitation.

E. RESPONSIBILITIES

1. The Assistant Secretary of Defense for Personnel and Readiness may supplement the enclosures to this Directive, and may delegate the authority to establish reporting requirements for the reasons for separation (Part 1, enclosure 3) to a Deputy Assistant Secretary.

2. The Secretaries of the Military Departments shall prescribe implementing documents to ensure that the policies, standards, and procedures in this Directive are administered in a manner that provides consistency in separation policy to the extent practicable in a system that is based on command discretion. The implementing documents also shall address the following matters:

- * a. Commander Responsibilities. The Secretary concerned, acting *
- * through his or her military commanders, shall ensure that the policies, *
- * standards and procedures of this directive are applied consistently, that *
- * fact-finding inquiries are conducted properly, that no abuse of authority *
- * occurs, and that failure to follow the provisions of this directive results *
- * in appropriate corrective action. *

- * b. Processing Goals. The Secretary concerned shall establish processing time goals for the types of administrative separations authorized by this Directive. Such goals shall be designed to further the efficient administration of the Armed Forces and shall be measured from the date of notification to the date of separation. Normally such goals should not exceed 15 working days for the notification procedure (Part 3, section B., enclosure 3) and 50 working days for the administrative board procedure (Part 3, section C., enclosure 3). Goals for shorter processing times are encouraged, particularly for cases in which expeditious action is likely. Variations may be established for complex cases or cases in which the separation authority is not located on the same facility as the respondent. The goals, and a program for monitoring effectiveness, shall be in the implementing document of the Military Department. Failure to process an administrative separation within the prescribed goal for processing times shall not create a bar to separation or characterization. *
- * c. Periodic Explanations. The Secretary concerned shall prescribe appropriate internal procedures for periodic explanation to enlisted members of the types of separations, the basis for their issuance, the possible effects of various actions upon reenlistment, civilian employment, veterans' benefits, and related matters, and the effects of 10 U.S.C. 977 (reference (b)) and Pub. L. No. 97-66 (1981) (reference (c)) concerning denial of certain benefits to members who fail to complete at least 2 years of an original enlistment. Such explanation may be provided in the form of a written fact sheet or similar document. The periodic explanation shall take place at least each time the provisions of the Uniform Code of Military Justice (UCMJ) are explained under Article 137 of the UCMJ (reference (d)). The requirement that the effects of the various types of separations be explained to enlisted members is a command responsibility, not a procedural entitlement. Failure on the part of the member to receive or to understand such explanation does not create a bar to separation or characterization. *
- * d. Provision of Information During Separation Processing. The Secretary concerned shall ensure that information concerning the purpose and authority of the Discharge Review Board and the Board for Correction of Military/Naval Records, established under 10 U.S.C. 1552 and 1553 (reference (e)) and DoD Directive 1332.28 (reference (f)) is provided during the separation processing of all members, except when the separation is for an immediate reenlistment. Specific counseling is required under 38 U.S.C. 3103(a) (reference (g)) which states that a discharge under other than honorable conditions, resulting from a period of continuous, unauthorized absence of 180 days or more, is a conditional bar to benefits administered by the Veterans Administration, notwithstanding any action by a Discharge Review Board. The information required by this paragraph should be provided in the form of a written fact sheet or similar document. Failure on the part of the member to receive or to understand such explanation does not create a bar to separation or characterization. *

F. PROCEDURES

Procedures and standards for implementing the policy in section D., above, are in enclosure 3.

G. EFFECTIVE DATE AND IMPLEMENTATION

1. This Directive is effective February 5, 1994.
2. This Directive applies only to administrative separation proceedings initiated on or after February 5, 1994 unless the Secretary of the Service concerned determines that it should be applied in a particular case in which proceedings were initiated before that date.
3. Forward two copies of proposed implementing documents to the Assistant Secretary of Defense for Personnel and Readiness within 30 days of the signature date.

A handwritten signature in black ink, appearing to read "J. Aspin". The signature is stylized with a large, looped initial "J" and a cursive "Aspin".

Enclosures - 4

1. References
2. Definitions
3. Standards and Procedures
4. Guidelines for Fact-Finding Inquiries into Homosexual Conduct

REFERENCES, continued

- (e) Section 1552 of title 10, United States Code (Correction of Military Records) and Section 1553 (Review of Discharge or Dismissal)
- (f) DoD Directive 1332.28, "Discharge Review Board (DRB) Procedures and Standards," August 11, 1982
- (g) Section 3103 of title 38, United States Code (Certain Bars to Benefits (Veterans Administration))
- (h) DoD Directive 1205.5, "Transfer of Members Between Reserve Components of the Military Services," May 16, 1980
- (i) DoD Instruction 1332.15, "Early Release of Military Enlisted Personnel for College or Vocational/Technical School Enrollment," June 1, 1976
- (j) DoD Directive 1344.10, "Political Activities by Members of the Armed Forces on Active Duty," June 15, 1990
- (k) DoD Directive 1300.6, "Conscientious Objectors," August 20, 1971
- * (l) DoD Directive 1315.15, "Special Separation Policies for Survivorship," *
- * September 26, 1988 *
- (m) Section on Mental Disorders, International Classification of Diseases and Injuries - 8, Diagnostic and Statistical Manual (DSM-III) of Mental Disorders, 3rd Edition, Committee on Nomenclature & Statistics, American Psychiatric Association, Washington, D.C., 1978
- (n) Chapter 61 of title 10, United States Code (Retirement or Separation for Physical Disability)
- (o) Section 1170 of title 10, United States Code (Regular Enlisted Members: Minority Discharge)
- (p) DoD Directive 1215.13, "Unsatisfactory Performance of Ready Reserve Obligation," June 30, 1979
- (q) Manual for Courts-Martial, 1969 (Revised Edition), as amended
- (r) DoD 5200.2-R, "DoD Personnel Security Program," January 1987, authorized by DoD Directive 5200.2, May 6, 1992
- (s) DoD Instruction 1336.1, "Certificate of Release or Discharge from Active Duty," January 6, 1989
- (t) DoD Directive 1010.1, "Drug Abuse Testing Program," December 28, 1984
- (u) Section 1163 of title 10, United States Code (Reserve Components: Members; Limitations on Separations)
- (v) Section 504 of title 10, United States Code (Persons Not Qualified for Enlistment)
- (w) Section 505 of title 10, United States Code (Regular Components: Qualifications, Terms, Grade)
- (x) Section 266 of title 10, United States Code (Boards for Appointment, Promotion, and Certain Other Purposes:
- (y) Section 654 of title 10, United States Code (Policy concerning homosexuality in the Armed Forces)
- * (z) DoD Instruction 5505.8, "Investigations of Sexual Misconduct by the *
- * Defense Criminal Investigative Organizations and Other DoD Law *
- * Enforcement Organizations," February 28, 1994 *

c. Dependency or hardship.

(1) Upon request of the member and concurrence of the government, separation may be directed when genuine dependency or undue hardship exists under the following circumstances:

- (a) The hardship or dependency is not temporary;
- (b) Conditions have arisen or have been aggravated to an excessive degree since entry into the Service, and the member has made every reasonable effort to remedy the situation;
- (c) The administrative separation will eliminate or materially alleviate the condition; and
- (d) There are no other means of alleviation reasonably available.

(2) Undue hardship does not necessarily exist solely because of altered present or expected income, family separation, or other inconveniences normally incident to Military Service.

d. Pregnancy or childbirth. A female member may be separated on the basis of pregnancy or childbirth upon her request, unless retention is determined to be in the best interests of the service under section A. of Part 2 and guidance established by the Military Department concerned.

e. Parenthood. A member may be separated by reason of parenthood if as a result thereof it is determined under the guidance set forth in section A. of Part 2 that the member is unable satisfactorily to perform his or her duties or is unavailable for worldwide assignment or deployment. Prior to involuntary separation under this provision, the Notification Procedure (section B. of Part 3) shall be used. Separation processing may not be initiated until the member has been counseled formally concerning deficiencies and has been afforded an opportunity to overcome those deficiencies as reflected in appropriate counseling or personnel records.

f. Conscientious objection. A member may be separated if authorized under DoD Directive 1300.6 (reference (k)).

g. Surviving family member. A member may be separated if * authorized under DoD Directive 1315.15 (reference (l)). *

h. Other designated physical or mental conditions.

(1) The Secretary concerned may authorize separation on the basis of other designated physical or mental conditions, not amounting to Disability (section D., below), that potentially interfere with assignment to or performance of duty under the guidance set forth in section A. of Part 2. Such conditions may include but are not limited to chronic seasickness or airsickness,

enuresis, and personality disorder.¹

(2) Separation processing may not be initiated until the member has been counseled formally concerning deficiencies and has been afforded an opportunity to overcome those deficiencies as reflected in appropriate counseling or personnel records.

(3) Separation on the basis of personality disorder is authorized only if a diagnosis by a psychiatrist or psychologist, completed in accordance with procedures established by the Military Department concerned, concludes that the disorder is so severe that the member's ability to function effectively in the military environment is significantly impaired.

(4) Separation for personality disorder is not appropriate when separation is warranted under sections A. through N. or section P. of this Part. For example, if separation is warranted on the basis of unsatisfactory performance (section G.) or misconduct (section K.), the member should not be separated under this section regardless of the existence of a personality disorder.

(5) Nothing in this provision precludes separation of a member who has such a condition under any other basis set forth under this section (Convenience of the Government) or for any other reason authorized by this Directive.

(6) Prior to involuntary separation under this provision, the Notification Procedure (section B. of Part 3) shall be used.

(7) The reasons designated by the Secretary concerned shall be separately reported.

i. Additional grounds. The Secretary concerned may provide additional grounds for separation for the convenience of the government. A copy of the document authorizing such grounds shall be forwarded to the ASD(P&R) on or before the date of implementation.

D. Disability.

1. Basis. A member may be separated for disability under the provisions of 10 U.S.C., chapter 61 (reference (n)).

¹Personality disorders are described in the Diagnostic and Statistical Manual (DSM-III) of Mental Disorders (reference (m)).

1. Basis. A member may be separated when it is determined under the guidance in section A. of Part 2 that the member is unqualified for further military service by reason of unsatisfactory performance. This reason shall not be used if the member is in entry-level status (section I. of enclosure 2).

2. Counseling and Rehabilitation. Separation processing may not be initiated until the member has been counseled formally concerning deficiencies and has been afforded an opportunity to overcome those deficiencies as reflected in appropriate counseling or personnel records. Counseling and rehabilitation requirements are of particular importance with respect to this reason for separation. Because military service is a calling different from any civilian occupation, a member should not be separated when unsatisfactory performance is the sole reason unless there have been efforts at rehabilitation under standards prescribed by the Secretary concerned.

3. Characterization or Description. The service shall be characterized as Honorable or General (under honorable conditions) in accordance with section C. of Part 2.

4. Procedures. The Notification Procedure (section B. of Part 3) shall be used.

H. Homosexual Conduct

1. Basis

a. Homosexual conduct is grounds for separation from the Military Services under the terms set forth in paragraph H.1.b., below. Homosexual conduct includes homosexual acts, a statement by a member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage. A statement by a member that demonstrates a propensity or intent to engage in homosexual acts is grounds for separation not because it reflects the member's sexual orientation, but because the statement indicates a likelihood that the member engages in or will engage in homosexual acts. A member's sexual orientation is considered a personal and private matter, and is not a bar to continued service under this section unless manifested by homosexual conduct in the manner described in paragraph H.1.b..

b. A member shall be separated under this section if one or more of the following approved findings is made:

(1) The member has engaged in, attempted to engage in, or solicited another to engage in a homosexual act or acts, unless there are approved further findings that:

(a) Such acts are a departure from the member's usual and customary behavior;

(b) Such acts under all the circumstances are unlikely to recur;

(c) Such acts were not accomplished by use of force, coercion, or intimidation;

(d) Under the particular circumstances of the case, the member's continued presence in the Armed Forces is consistent with the interest of the Armed Forces in proper discipline, good order, and morale; and

(e) The member does not have a propensity or intent to engage in homosexual acts.

(2) The member has made a statement that he or she is a homosexual or bisexual, or words to that effect, unless there is a further

approved finding that the member has demonstrated that he or she is not a person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts. A statement by a Service member that he or she is a homosexual or bisexual, or words to that effect, creates * a rebuttable presumption that the Service member engages in, attempts to * engage in, has a propensity to engage in, or intends to engage in homosexual * acts. The Service member shall be advised of this presumption and given the * opportunity to rebut the presumption by presenting evidence demonstrating * that he or she does not engage in, attempt to engage in, have a propensity to * engage in, or intend to engage in homosexual acts. Propensity to engage in * homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts. In determining whether a member has successfully * rebutted the presumption that he or she engages in, attempts to engage in, or * has a propensity or intent to engage in homosexual acts, some or all of the following may be considered:

- (a) Whether the member has engaged in homosexual acts;
- (b) The member's credibility;
- (c) Testimony from others about the member's past conduct, character, and credibility;
- (d) The nature and circumstances of the member's statement;
- (e) Any other evidence relevant to whether the member is likely to engage in homosexual acts.

(This list is not exhaustive; any other relevant evidence may also be considered.)

(3) The member has married or attempted to marry a person known to be of the same biological sex (as evidenced by the external anatomy of the persons involved).

2. Burden of Proof. See paragraphs H.4.e. and f., below, for guidance as to the burden of proof and when a finding regarding retention is required.

3. Characterization or Description. Characterization of service or description of separation shall be in accordance with the guidance in section C. of Part 2. When the sole basis for separation is homosexual conduct, a characterization Under Other Than Honorable Conditions may be issued only if such a characterization is warranted under section C. of Part 2 and there is a finding that during the current term of service the member attempted, solicited, or committed a homosexual act in the following circumstances:

- a. By using force, coercion, or intimidation;
- b. With a person under 16 years of age;
- c. With a subordinate in circumstances that violate customary military superior-subordinate relationships;
- d. Openly in public view;
- e. For compensation;
- f. Aboard a military vessel or aircraft; or

g. In another location subject to military control under aggravating circumstances noted in the finding that have an adverse impact on discipline, good order, or morale comparable to the impact of such activity aboard a vessel or aircraft.

4. Procedures. The Administrative Board Procedure (section C. of Part 3) shall be used, subject to the following guidance:

a. Separation processing shall be initiated if there is probable cause to believe separation is warranted under paragraph H.1.b., above. Fact-finding procedures for inquiries into homosexual conduct are in enclosure 4.

b. The Administrative Board shall follow the procedures set forth in subsection C.5. of Part 3, except with respect to the following matters:

(1) If the Board finds that one or more of the circumstances authorizing separation under paragraph H.1.b., above, is supported by the evidence, the Board shall recommend separation unless the Board finds that retention is warranted under the limited circumstances described in that paragraph.

(2) If the Board does not find that there is sufficient evidence that one or more of the circumstances authorizing separation under paragraph H.1.b. has occurred, the Board shall recommend retention unless the case involves another basis for separation of which the member has been duly notified.

c. In any case in which characterization of service Under Other Than Honorable Conditions is not authorized, the Separation Authority may be exercised by an officer designated under paragraph B.4.a. of Part 3.

d. The Separation Authority shall dispose of the case according to the following provisions:

(1) If the Board recommends retention, the Separation Authority shall take one of the following actions:

(a) Approve the finding and direct retention; or

(b) Forward the case to the Secretary concerned with a recommendation that the Secretary separate the member under the Secretary's authority (section O. of this Part).

(2) If the Board recommends separation, the Separation Authority shall take one of the following actions:

(a) Approve the finding and direct separation; or

(b) Disapprove the finding on the basis of the following considerations:

1 There is insufficient evidence to support the finding; or

2 Retention is warranted under the limited circumstances described in paragraph H.1.b., above.

(3) If there has been a waiver of Board proceedings, the Separation Authority shall dispose of the case in accordance with the following provisions:

(a) If the Separation Authority determines that there is not sufficient evidence to support separation under paragraph H.1.b., above, the

Separation Authority shall direct retention unless there is another basis for separation of which the member has been duly notified.

(b) If the Separation Authority determines that one or more of the circumstances authorizing separation under paragraph H.1.b. has occurred, the member shall be separated unless retention is warranted under the limited circumstances described in that paragraph.

* e. The member shall bear the burden of proving throughout the *
* proceeding, by a preponderance of the evidence, that retention is warranted *
* under the limited circumstances described in subparagraphs H.1.b.(1) and *
* H.1.b.(2). *

f. Findings regarding whether or not retention is warranted under the limited circumstances of paragraph H.1.b. are required if the member clearly and specifically raises such limited circumstances.

g. Nothing in these procedures:

(1) Limits the authority of the Secretary concerned to take appropriate action in a case to ensure that there has been compliance with this Directive;

(2) Requires that a member be processed for separation when a determination is made in accordance with regulations prescribed by the Secretary concerned that:

(a) The member engaged in acts, made statements, or married or attempted to marry a person known to be of the same biological sex for the purpose of avoiding or terminating military service; and

(b) Separation of the member would not be in the best interest of the Armed Forces.

(3) Precludes retention of a member for a limited period of time in the interests of national security as authorized by the Secretary concerned;

(4) Authorizes a member to seek Secretarial review unless authorized in procedures promulgated by the Secretary concerned;

(5) Precludes separation in appropriate circumstances for another reason in this Directive; or

(6) Precludes trial by court-martial in appropriate cases.

I. Drug Abuse Rehabilitation Failure

1. Basis

a. A member who has been referred to a program of rehabilitation for personal drug and alcohol abuse may be separated for failure through inability or refusal to participate in, corporate in, or successfully complete such a program in the following circumstances:

(1) There is a lack of potential for continued military service;
or

(2) Long-term rehabilitation is determined necessary and the member is transferred to a civilian medical facility for rehabilitation.

DEFINITIONS

A. Bisexual. A person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts.

B. Convening Authority. (1) The Separation Authority or (2) a commanding officer who has been authorized by the Secretary concerned to process the case except for final action and who otherwise has the qualifications to act as a Separation Authority.

C. Discharge. Complete severance from all military status gained by the enlistment or induction concerned.

D. Entry-Level Status. Upon enlistment, a member qualifies for entry-level status during (1) the first 180 days of continuous active military service or (2) the first 180 days of continuous active service after a service break of more than 92 days of active service. A member of a Reserve component who is not on active duty or who is serving under a call or order to active duty for 180 days or less begins entry level status upon enlistment in a Reserve component. Entry level status for such a member of a Reserve component terminates as follows: (a) 180 days after beginning training if the member is ordered to active duty for training for one continuous period of 180 days or more; or (b) 90 days after the beginning of the second period of active duty training if the member is ordered to active duty for training under a program that splits the training into two or more separate periods of active duty. For the purposes of characterization of service or description of separation, the member's status is determined by the date of notification as to the initiation of separation proceedings.

E. Homosexual. A person, regardless of sex, who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual acts.

F. Homosexual Act

1. Any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires, and

2. Any bodily contact that a reasonable person would understand to demonstrate a propensity or intent to engage in an act described in subsection F.1., above.

G. Homosexual Conduct. A homosexual act, a statement by the Service member that demonstrates a propensity or intent to engage in homosexual acts, or a homosexual marriage or attempted marriage.

H. Member. An enlisted member of a Military Service.

I. Military Record. An individual's overall performance while a member of a Military Service, including personal conduct and performance of duty.

J. Propensity. Propensity to engage in homosexual acts means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts.

K. Release from Active Duty. Termination of active duty status and transfer or revision to a Reserve component not on active duty, including transfer to the Individual Ready Reserve (IRR).

L. Respondent. A member of a Military Service who has been notified that action has been initiated to separate the member.

M. Separation. A general term that includes discharge, release from active duty, release from custody and control of the Armed Forces, transfer to the IRR, and similar changes in Active or Reserve status.

N. Separation Authority. An official authorized by the Secretary concerned to take final action with respect to a specified type of separation.

* O. Sexual Orientation. An abstract sexual preference for persons of a *
* particular sex, as distinct from a propensity or intent to engage in *
* sexual acts. *

* P. Statement that a Member Is a Homosexual or Bisexual or Words to That *
* Effect. Language or behavior that a reasonable person would believe was *
* intended to convey the statement that a person engages in, attempts to *
* engage in, or has a propensity or intent to engage in homosexual acts. *

GUIDELINES FOR FACT-FINDING INQUIRIES INTO HOMOSEXUAL CONDUCT

A. RESPONSIBILITY

1. Only the member's commander is authorized to initiate fact-finding inquiries involving homosexual conduct. A commander may initiate a fact-finding inquiry only when he or she has received credible information that there is basis for discharge. Commanders are responsible for ensuring that inquiries are conducted properly and that no abuse of authority occurs.

2. A fact-finding inquiry may be conducted by the commander personally or by a person he or she appoints. It may consist of an examination of the information reported or a more extensive investigation, as necessary.

3. The inquiry should gather all credible information that directly relates to the grounds for possible separation. Inquiries shall be limited to the factual circumstances directly relevant to the specific allegations.

4. If a commander has credible evidence of possible criminal conduct, he or she shall follow the procedures outlined in the Manual for Courts-Martial and implementing regulations issued by the Secretaries of the Military Departments concerned (reference (y)).

* 5. The guidelines in this enclosure do not apply to activities of *
* Defense Criminal Investigative Organizations and other DoD law enforcement *
* organizations, which are governed by DoD Instruction 5505.8 (reference (z)). *

B. DEFINITIONS

1. Bisexual. A person who engages in, attempts to engage in, has a propensity to engage in, or intends to engage in homosexual and heterosexual acts.

2. Commander. A commissioned or warrant officer who, by virtue of rank and assignment, exercises primary command authority over a military organization or prescribed territorial area that under pertinent official directives is recognized as a "command."

* 3. Homosexual. A person, regardless of sex, who engages in, attempts to *
engage in, has a propensity to engage in, or intends to engage in homosexual *
acts.

* 4. Homosexual Conduct. "Homosexual conduct" is a homosexual act, a *
statement by the member that demonstrates a propensity or intent to engage in *
homosexual acts, or a homosexual marriage or attempted marriage.

a. A "homosexual act" means any bodily contact, actively undertaken or passively permitted, between members of the same sex for the purpose of satisfying sexual desires and any bodily contact (for example, hand-holding or kissing, in most circumstances) that a reasonable person would understand to demonstrate a propensity or intent to engage in such an act.

b. A "statement that a member is a homosexual or bisexual, or words to that effect," means (1) language or behavior that (2) a reasonable person *
* would believe (3) was intended to convey the statement (4) that a person *
* engages in, attempts to engage in, or has a propensity or intent to engage in *
* homosexual acts. This may include statements such as "I am a homosexual," "I *
am gay," "I am a lesbian," "I have a homosexual orientation," and the like.

c. A "homosexual marriage or attempted marriage" is when a member has married or attempted to marry a person known to be of the same biological sex.

d. "Propensity to engage in homosexual acts" means more than an abstract preference or desire to engage in homosexual acts; it indicates a likelihood that a person engages in or will engage in homosexual acts.

* 5. Sexual Orientation. An abstract sexual preference for persons of *
* a particular sex, as distinct from a propensity or intent to engage in *
* sexual acts. *

* C. BASES FOR CONDUCTING INQUIRIES *

* 1. A commander will initiate an inquiry only if he or she has credible *
* information that there is a basis for discharge. Credible information exists *
* when the information, considering its source and the surrounding circum- *
* stances, supports a reasonable belief that there is a basis for discharge. *
* It requires a determination based on articulable facts, not just a belief or *
* suspicion. *

* 2. A basis for discharge exists if: *

* a. The member has engaged in a homosexual act. *

* b. The member has said that he or she is a homosexual or bisexual, *
* or made some other statement that indicates a propensity or intent to engage
* in homosexual acts; or

* c. The member has married or attempted to marry a person of the same *
* sex.

* 3. Credible information does not exist, for example, when: *

* a. The individual is suspected of engaging in homosexual conduct, *
* but there is no credible information, as described, to support that suspicion;
* or

* b. The only information is the opinions of others that a member is *
* homosexual; or

* c. The inquiry would be based on rumor, suspicion, or capricious *
* claims concerning a member's sexual orientation; or

* d. The only information known is an associational activity such as *
* going to a gay bar, possessing or reading homosexual publications, associating
* with known homosexuals, or marching in a gay rights rally in civilian clothes.
* Such activity, in and of itself, does not provide evidence of homosexual
* conduct.

* 4. Credible information exists, for example, when: *

* a. A reliable person states that he or she observed or heard *
* a Service member engaging in homosexual acts, or saying that he or she is a
* homosexual or bisexual or is married to a member of the same sex; or

* b. A reliable person states that he or she heard, observed, or *
* discovered a member make a spoken or written statement that a reasonable
* person would believe was intended to convey the fact that he or she engages
* in, attempts to engage in, or has a propensity or intent to engage in
* homosexual acts; or

* c. A reliable person states that he or she observed behavior that *
* amounts to a non-verbal statement by a member that he or she is a homosexual
* or bisexual; i.e., behavior that a reasonable person would believe was
* intended to convey the statement that the member engages in, attempts to
* engage in, or has a propensity or intent to engage in homosexual acts. *

D. PROCEDURES

1. Informal fact-finding inquiries and administrative separation procedures are the preferred method of addressing homosexual conduct. This does not prevent disciplinary action or trial by courts-martial when appropriate.

2. Commanders shall exercise sound discretion regarding when credible information exists. They shall examine the information and decide whether an inquiry is warranted or whether no action should be taken.

3. Commanders or appointed inquiry officials shall not ask, and members * shall not be required to reveal, whether a member is a heterosexual, * a homosexual, or a bisexual. However, upon receipt of credible information of * homosexual conduct (as described in section C., above) commanders or appointed * inquiry officials may ask members if they engaged in such conduct. But the * member should first be advised of the DoD policy on homosexual conduct (and * rights under Article 31, UCMJ, if applicable). Should the member choose not * to discuss the matter further, the commander should consider other available * information. Nothing in this provision precludes questioning a member about * any information provided by the member in the course of the fact-finding * inquiry or any related proceeding, nor does it provide the member with any * basis for challenging the validity of any proceeding or the use of any * evidence, including a statement by the member, in any proceeding. *

4. At any given point of the inquiry, the commander or appointed inquiry official must be able clearly and specifically to explain which grounds for separation he or she is attempting to verify and how the information being collected relates to those specific separation grounds.

5. A statement by a Service member that he or she is a homosexual or bisexual creates a rebuttable presumption that the Service member engages in, * attempts to engage in, has a propensity to engage in, or intends to engage in * homosexual acts. The Service member shall be given the opportunity to * present evidence demonstrating that he or she does not engage in, attempt * to engage in, or have a propensity or intent to engage in homosexual acts. *

6. The Service member bears the burden of proving, by a preponderance of * the evidence, that he or she is not a person who engages in, attempts to * engage in, has a propensity to engage in, or intends to engage in homosexual * acts.

* E. LEGAL EFFECT *

The procedures in this enclosure create no substantive or procedural rights.